

**KETUA PENGARAH HASIL DALAM NEGERI
v. REVENUE POINT SDN BHD**

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
CHOO KAH SING JCA
[CIVIL APPEAL NO: W-01(A)-103-02-2022]
8 MAY 2024

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Abstract – *To ascertain the business of a limited company, one must look at what business it actually carries and not what business it professes to carry on. The conduct of a taxpayer, subsequent to its acquisition of an asset, may be inconsistent with its stated intention to invest in an asset. Mere intention would not be sufficient to establish that a property is held for the purpose of trading or otherwise. Ultimately, the conduct of the taxpayer makes, and evidences, such determination. When an inference can be made that disposal of the assets is in the nature of trade, the gains derived from the said disposal are trading receipts and are taxable under s. 4(a) of the Income Tax Act 1967.*

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REVENUE LAW: *Income tax – Assessment – Property investment company executed en bloc transaction for sale of apartment units in separate sale transactions – Whether gains from disposal of apartment units subjected to Real Property Gains Tax Act 1976 or Income Tax Act 1967 – Badge of trade – Assessment of – Whether disposals trading in nature – Whether gains derived from disposal of apartment units trading receipts and ought to be taxable under s. 4(a) of Income Tax Act 1967*

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REVENUE LAW: *Income tax – Assessment – Best judgment assessment on tax liability – Whether excessive – Whether burden of proof lay on taxpayer to prove assessment was erroneous – Whether there was legitimate basis to challenge validity and propriety of best judgment assessment issued – Income Tax Act 1967, s. 90(3)*

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REVENUE LAW: *Income tax – Tax return – Failure to submit tax return within stipulated time – Imposition of penalty – Whether validly imposed – Whether Director General of Inland Revenue has discretion to impose penalty pursuant to s. 112(3) of Income Tax Act 1967*

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The appellant was the Director General of Inland Revenue ('DGIR') while the respondent was a locally incorporated company, whose principal business activities were letting of properties and property investment. The respondent had entered into a sale and purchase agreement with one Sinar Merdu Sdn Bhd for the acquisition of 59 apartment units and a clubhouse in a building known as Fahrenheit 88 adjacent to the Pavilion Bukit Bintang Kuala Lumpur for a purchase price of RM45,505,000. It was said that the

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- A respondent's ultimate intention was to place these properties in a real estate investment trust. The properties were consistently treated as the respondent's fixed asset in its audited accounts. In the year of assessment ('YA') 2010, the respondent was approached by a third party, Jubilee Harmoni Sdn Bhd, which informed the respondent that it had potential buyers for all the 59 apartment units. Thus, through Jubilee Harmoni, the respondent executed an *en bloc* transaction for the sale of the 59 apartment units and the three other units in three separate sale transactions. The disposals were carried out by the respondent in four separate occasions from the YAs 2010 to 2011. In respect of these disposals, the gains were subjected to additional assessment for the disposal of the three apartment units in the YA 2010, whilst the disposal of the balance 56 apartment units in the YA 2011 had been declared by the respondent taxpayer in its tax return and thus, a deemed assessment by the DGIR. As for the YAs 2009 and 2010, the respondent had, however, failed to submit its tax returns, which led to the appellant raising an assessment under s. 90(3) of the Income Tax Act 1967 ('ITA') – the best judgment assessment. As a result, the respondent filed four Form Q to the Special Commissioners of Income Tax ('SCIT') against the YA 2009 – best judgment assessment dated 27 September 2012; the YA 2010 – best judgment assessment dated 27 September 2012; the YA 2010 – additional assessment dated 30 January 2013; and the YA 2011 – deemed assessment. All four were dismissed by the SCIT. The respondent lodged an appeal to the High Court. The High Court, in overturning the decision of the SCIT, held that the respondent had successfully discharged the burden of proof on the balance of probabilities. The High Court found that the gains from the disposal of the 59 apartment units should be subjected to the Real Property Gains Tax Act 1976 ('RPGT Act'), instead of s. 4(a) of the ITA, based on its findings that the respondent's true purpose of acquiring the properties was for the sole intention of investment, that the sale of the apartments was due to an irresistible offer from the purchaser; and that the true and proper examination of the badges of trade test illustrated that the disposal of the properties was not in the nature of trading. Aggrieved, the DGIR appealed against the said decision. The central issue was whether the disposal by the respondent of its 59 apartment units was subjected to real property gains tax under s. 3 of the RGPT Act or s. 4(a) of the ITA.

Held (allowing appeal)**H Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:**

- (1) It is within the remit of the SCIT to determine whether a trade is being carried on, and that outcome is a finding on a question of fact, which should not be so readily interfered with. This determination is dependent on the assessment on the test on the badges of trade which, in any event, is merely a guide which is employed to assist in the deliberation as to whether a set of facts and circumstances would constitute a trade or an adventure in the nature of trade. No one single badge of trade is usually conclusive in answering the question of whether

a certain transaction is trading in nature, and that it is likely that the answer will turn on a combination of more than one badge. Even if these findings could be interfered with, it must be by reason of such a finding being one that was unsupported by evidence or that could not have been reached by a properly constituted body of tax commissioners acting reasonably. (paras 25-27)

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- (2) In the analysis of the badge of trade on the subject matter of the transaction, the SCIT was not wrong to have taken the view – that accounting treatment of the properties – where the respondent had consistently classified the apartments as non-current assets in its financial statements – was not conclusive evidence that they were held for investment and not trading. In other words, such treatment must instead be weighed against other evidence in order to determine the true nature of the transaction. Despite the principal business of the respondent being stated as the letting of properties and property investments, to ascertain the business of a limited company, one must look at what business it actually carries and not what business it professes to carry on. The conduct of a taxpayer subsequent to its acquisition of the asset may be inconsistent with its stated intention to invest in the asset. Mere intention would not be sufficient to establish that a property was held for the purpose of trading or otherwise. Ultimately, the conduct of the taxpayer makes and evidences such determination. (paras 32-47)

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- (3) The 59 apartment units were the only investments made by the respondent (including the clubhouse) but notwithstanding the sale, the respondent, despite professing to be a company in the business of owning properties for rental income, had not acquired any other properties. In addition, there was no evidence on the utilisation of the proceeds of the sale either, when it might reasonably be expected that the same be used to invest in other properties. This did not exhibit conduct on the part of the respondent which was consistent with that of an investment company. Further, even though the intention at the time of the purchase may be for investment, it could later change and be for trading and *vice versa*. Even if the respondent could establish its intention when acquiring the 59 apartment units at the Fahrenheit 88 near the Pavilion Kuala Lumpur was purely for investment, it could not be ruled out that the respondent subsequently changed its intention and decided to sell them for trading gains instead. This, again, underscored the importance of evaluating the conduct of the taxpayer, which in this case had been shown to have been inconsistent with that of an investment company. (paras 48-53)

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- (4) On the badge of trade concerning the length of the period of ownership of the 59 apartment units, in general, property intended for trading is realised within a short time after acquisition. Whilst generally a long period of ownership before disposal would more likely be regarded as

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- A an investment, at the same time, all cases must depend on the consideration of the peculiar facts and circumstances of each case. The relevant period was to be computed from the time the taxpayer was in complete possession of the asset and not from the purchase date. The SCIT was justified in making the finding of the presence of the badge of trade in respect of the period of ownership (three years) of the 59 apartment units by the respondent. (paras 54-60)
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- (5) Whilst the 59 apartment units were indeed the only assets of the respondent, it was inaccurate to contend that the badge of trade on the frequency of transaction was absent. This was because the 59 apartment units were disposed of in four separate transactions. Even a single or isolated transaction could amount to trading. As such, it was not accurate for the High Court to find that the disposals were not trading in nature by reason, among others, that there was no badge of trade on frequency of transactions. (paras 64-66)
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- D (6) Despite the respondent – a property investment or rental company – claiming that the apartment units were intended for rental income, the respondent did not, at any time before or after taking over ownership of the 59 apartment units, undertake any refurbishment or renovation works on the same, unlike what other property investment or rental entities may be expected to have done in similar circumstances. Ordinarily, steps are taken by owners of investment assets to improve or increase the market value of the investment, but evidently nothing was done by the respondent herein. Furthermore, apart from the lack of efforts on the part of the respondent to generate rental income from the vacant units, there was no evidence to suggest that the sale of these units were made in order to purchase another investment. Additionally, although collection of rental incomes suggested the properties were held for investment, this was not necessarily the position in all cases. The rental income in this situation – of the apartment units in Fahrenheit 88 in Pavilion Bukit Bintang – was merely incidental given the respondent was fully aware of the huge commercial potential from the opening of the Pavilion, which meant that profits from resale of the properties must have been keenly anticipated. More so as they had matured after three years, and were located in a most strategic and developed business location in the heart of Kuala Lumpur. The approach taken and the conclusion arrived at by the SCIT was not erroneous, given that the SCIT found the existence of the badges of trade because, despite the respondent having continued with the rental activities of the affected apartment units, this lasted for only three years, as the respondent decided to entertain what it construed as an ‘irresistible offer’ to sell the properties. (paras 77-81)
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- (7) The respondent failed to demonstrate that the respondent was in any immediate need of funds, or was facing any emergencies or financial difficulties that could have necessitated the sale of what was claimed to

be a long-term investment. The sale was due to the respondent accepting an irresistible offer which was ruled not to show a badge of trade. This seemed different from the sale being attributed to an immediate need of funds or to a forced sale. Moreover, the 'irresistible offer' was merely an offer made by potential buyers due to the appreciation of the value of the apartment units. Something which must surely have been envisaged even at the point of the acquisition of these assets in the most strategically-located Pavilion Bukit Bintang Kuala Lumpur. The respondent had also appeared to admit that it had acquired the apartment units with a view to resale at a profit in light of the witness statement of one of its directors before the SICT which whilst insisting that the intention was to hold the property for investment and rental income also agreed that the respondent would hold the units until it was time to sell them, with the implication this would happen when the value had sufficiently appreciated. Accordingly, the almost inescapable inference was that the disposal of the 59 apartment units was in the nature of trade, as correctly found by the SCIT. Thus, the gains derived from the disposal of the 59 apartment units were trading receipts and taxable under s. 4(a) of the ITA as business income and not capital receipts taxable under the RPGT Act. (paras 84-88)

- (8) The respondent had not given any evidence to show the alleged true or actual income to be reported for the said years of assessment 2009 and 2010. The burden of proof lay with the taxpayer to show that the assessment was excessive or erroneous. Here, on the best judgment assessments made by the appellant, no evidence was tendered to demonstrate how the figures submitted by the respondent represented the true or correct amount of income and tax to be imposed. And without explaining as to why the amount differed from the appellant's assessment. The respondent had submitted the requisite Form Q, but there was no information whether the respondent furnished supporting documents such as its tax computation and audited financial statements to make its case that the best judgment assessment was excessive in comparison to its actual tax liability. Neither did the respondent make any application for an extension of time for the appeal by way of submitting a Form N in respect of the application for an extension of period for making an appeal to the SCIT *vis-à-vis* the said best judgment assessments. The High Court fell into error when it set aside the SCIT's finding of no proof of excessiveness or error on the part of the best judgment assessment on the tax liability of the respondent as issued by the appellant for the YAs 2009 and 2010. (paras 98-103)
- (9) The SCIT was correct to affirm the imposition of penalty by the appellant under s. 112(3) of the ITA for the failure by the respondent to submit its tax return for the YAs 2009 and 2010 within the stipulated time. Further, penalty was also validly imposed on the additional assessment which had been raised under s. 112(4) since even the

- A respondent's late submission of tax return for the YA 2010 did not include any declaration of the gains received from the disposal of the three apartment units (which had been sold earlier than the other 56). There was no justification for the High Court to set aside the penalty in its relevant notices of assessment and additional assessment correctly imposed by the appellant on the respondent. The appellant plainly had the discretion to do so in pursuance of s. 112(3) of the ITA given the failure of the respondent to submit tax returns for the YAs 2009 and 2010 in accordance with the time period stipulated in s. 77A(1) of the ITA (which was within seven months from the date following the close of the accounting period) which resulted in the inordinate delay of more than three years in respect of the returns for the YA 2009 and more than two years for the YA 2010. (paras 110 & 111)
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- (10) The SCIT had correctly decided that the respondent failed to discharge its burden of proof that the assessments raised by the appellant were erroneous or excessive. The findings of the SCIT were based on facts, supported by evidence and were, therefore, unassailable and should not have been disturbed by the High Court. The assessments raised by the appellant and confirmed by the SCIT were correct as the respondent had made trading and not capital gains when disposing the 59 apartment units. Neither was there any legitimate basis for the respondent to challenge the validity and propriety of the best judgment assessments issued and the penalty imposed by the appellant against the respondent. The decision of the SCIT was therefore reinstated. (paras 113-115)
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Case(s) referred to:

- F *ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 3 CLJ 936 CA (*refd*)
AS Sdn Bhd v. Director General Of Inland Revenue [1991] 1 MSTC 434 (*refd*)
DEF v. The Comptroller Of Income Tax (1950-1985) MSTC 482 (*refd*)
DGIR v. LCW [1985] 1 BLJ 143 FC (*refd*)
DJ Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1996] MSTC 2471 (*refd*)
- G *E v. Comptroller-General Of Inland Revenue* [1970] CLJU 25; [1970] 1 LNS 25 FC (*refd*)
Edwards (Inspector Of Taxes) v. Bairstow [1956] AC 14 (*refd*)
HCM v. Director General Of Inland Revenue [1993] 2 MSTC 539 (*refd*)
I Investment Ltd v. Comptroller-General Of Inland Revenue [1975] CLJU 61; [1975] 1 LNS 61 FC (*refd*)
- H *International Investment Ltd v. Comptroller-General Of Inland Revenue Malaysia* [1978] CLJU 69; [1978] 1 LNS 69 PC (*refd*)
International Naturopathic Bio-Tech (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2024] 2 CLJ 519 CA (*refd*)
Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135 SC (*refd*)
- I *Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal* [2006] 2 CLJ 835 CA (*refd*)
Kota Kinabalu Industries Sdn Bhd v. Director General Of Inland Revenue [1981] CLJU 50; [1981] 1 LNS 50 FC (*refd*)

- Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540 SC (*refd*) A
- Marson (Inspector of Taxes) v. Morton* [1986] 1 WLR 1343 (*refd*)
- NYF Realty Sdn Bhd v. Comptroller Of Inland Revenue* [1985] 1 BLJ 234 HC (*refd*)
- Odeon Associated Theatres Ltd v. Jones* [1971] 2 All ER 407 (*refd*)
- Rutledge v. Commissioners Of Inland Revenue* CS 1929 14 TC 490 (*refd*)
- Simmons (As Liquidator Of Lionel Simmons Properties Ltd) v. Inland Revenue Commissioners* [1980] 2 All ER 798 (*refd*) B
- Taylor v. Good (Inspector Of Taxes)* [1974] 1 WLR 556 (*refd*)
- Wisdom v. Chamberlain* [1969] 1 All ER 332 (*refd*)

Legislation referred to:

Income Tax Act 1967, ss. 4(a), 77(1), 77A(1), 90(3), 99(1), 112(3)(a), (4), 113(2), Schedule 5 paras 13, 34 C

Real Property Gains Tax Act 1976, s. 3

For the appellant - Normareza Mat Rejab, Syazana Safiah Rozman & Muhammad Danial Izzat Zulfahari; SRC

For the respondent - S Saravana Kumar & Nur Hanina Mohd Azham; M/s Rosli Dahlan Saravana Partnership D

[Editor's note: For the High Court judgment, please see *Revenue Point Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] CLJU 2836; [2022] 1 LNS 2836 (overruled).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] This is an appeal against the judgment of the High Court, which set aside the decision of the Special Commissioners of Income Tax ("SCIT"), which had earlier dismissed the respondent taxpayer's appeal against the assessment raised by the appellant under s. 4(a) of the Income Tax Act 1967 ("the ITA"). F

[2] The principal issue in this appeal is whether the gains derived from the disposal of some 59 apartment units by the respondent are trading receipts and therefore taxable under s. 4(a) of the ITA or capital receipts taxable under the Real Property Gains Tax Act 1976 ("the RPGT Act"). G

[3] Having heard the appeal, examined the appeal records and considered the submissions by parties, we unanimously decided to set aside the decision of the High Court and reinstate that of the SCIT, and therefore allow this appeal, for the reasons which we set out herein. H

Key Background Facts

[4] The appellant is the Director General of Inland Revenue ("the DGIR") and Revenue Point Sdn Bhd, a locally incorporated company, is the respondent, which has the letting of properties and property investment I

- A as its principal business activities. The former is appealing against the decision of the High Court which had reversed the decision of the SCIT, confirming the latter's assessments to income tax under s. 4(a) of the ITA for the disposal of the 59 apartment units located in a building known as Fahrenheit 88 near Pavilion Bukit Bintang in Kuala Lumpur.
- B [5] The respondent had, on 15 August 2007, entered into a sale and purchase agreement with one Sinar Merdu Sdn Bhd for the acquisition of 59 apartment units and a clubhouse in a building known as Fahrenheit 88 adjacent to the Pavilion Bukit Bintang Kuala Lumpur for a purchase price of RM45,505,000. It was said that the respondent's ultimate intention was
- C to place these properties in a real estate investment trust. The properties were consistently treated as the respondent company's fixed asset in its audited accounts.
- D [6] In the year of assessment ("YA") 2010, the respondent was approached by a third party – Jubilee Harmoni Sdn Bhd ("Jubilee Harmoni"), which informed the respondent that it had potential buyers for all the 59 apartment units. Thus, through Jubilee Harmoni, the appellant executed an *en bloc* transaction for the sale of 56 apartment units and the three other units in three separate sale transactions. One unit was sold to Wawasan Terkenal Sdn Bhd on 5 May 2010, another two were sold to Patent Furniture Sdn Bhd on 7 May 2010 in separate agreements, and the remaining 56 were
- E sold together to Nusansuria Development Sdn Bhd on 6 October 2010.
- F [7] The disposals were carried out by the respondent in four separate occasions from the YAs 2010 to 2011. In respect of these disposals, the gains were subjected to an additional assessment dated 30 January 2013 for the disposal of the three apartment units in the YA 2010, whilst the disposal of the balance 56 apartment units in the YA 2011 had been declared by the respondent taxpayer in its tax return and thus, a deemed assessment by the DGIR. As for the YAs 2009 and 2010, the respondent taxpayer had however failed to submit its tax return, which led to the appellant raising an
- G assessment under s. 90(3) of the ITA dated 27 September 2012 – the best judgment assessment.
- H [8] The respondent, as a result, filed four Forms Q to the SCIT against the YA 2009 – best judgment assessment dated 27 September 2012; the YA 2010 – best judgment assessment also dated 27 September 2012; the YA 2010 – additional assessment dated 30 January 2013; and the YA 2011 – deemed assessment.
- I [9] All four were dismissed by the SCIT, as stated in the deciding order dated 14 June 2019. The key parts of the deciding order of the SCIT read as follows:
- ADALAH DIPUTUSKAN SECARA SEBULAT SUARA bahawa Perayu telah gagal membuktikan rayuan Perayu selaras dengan perenggan 13 Jadual 5 Akta Cukai Pendapatan 1967 [Akta 53];

DAN bahawa terdapatnya ‘badges of trade’ di dalam pembelian dan pelupusan 59 unit pangsapuri Farenheit 88, No 179, Jalan Bukit Bintang, 55100 Kuala Lumpur;

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DAN bahawa keuntungan pelupusan 59 unit pangsapuri tersebut adalah penerimaan perniagaan dan dicukai di bawah perenggan 4(a) Akta 53 sebagai pendapatan perniagaan bagi tahun taksiran 2010 dan 2011;

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DAN bahawa Perayu selepas memfailkan Borang Q terhadap taksiran anggaran yang dikeluarkan Responden telah gagal membuktikan kesilapan dalam taksiran anggaran yang dikatakan telah berlaku;

DAN bahawa Perayu telah gagal membuktikan jumlah sebenar pendapatan Perayu dan jumlah sebenar pendapatan yang kena dibayar cukai Perayu bagi Tahun Taksiran 2009 dan 2010 yang perlu dilaporkan dan jumlah dalam taksiran anggaran adalah jumlah yang tidak betul;

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[10] The respondent taxpayer nevertheless successfully lodged an appeal to the High Court by way of case stated as the High Court on 7 February 2022 ruled to overturn the decision of the SCIT. Hence, the instant appeal by the appellant DGIR before us.

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The Essence Of The High Court Decision

[11] The High Court, in this case, decided that the respondent had successfully discharged the burden of proof on the balance of probabilities, reversed the finding of the SCIT and held that the gains from the disposal of the 59 apartment units should be subjected to the RPGT Act instead of s. 4(a) of the ITA based on its findings that the respondent’s true purpose of acquiring the properties was for the sole intention of investment, that the sale of the apartments was due to an irresistible offer from the purchaser; and that the true and proper examination of the badges of trade test illustrated that the disposal of the properties was not in the nature of trading.

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The Principal Grounds Of Appeal

[12] The DGIR’s grievances against the decision of the High Court may be summarised as follows.

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[13] First, it was emphasised that the High Court did not adhere to the established tax appeal principles that findings of fact by the SCIT and inferences made therefrom are unassailable. Secondly, it gave undue weight to the respondent taxpayer’s classification of the properties in the respondent taxpayer’s audited accounts when such evidence had been held to be not conclusive. Thirdly, the High Court did not appreciate that intention at the point of acquisition of the properties is not determinative of whether the respondent taxpayer is engaging in an adventure or concern in the nature of trade, particularly when the subsequent act and conduct of the respondent taxpayer are inconsistent with the intention to invest.

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- A [14] Fourthly, the High Court did not appreciate the fact that the respondent taxpayer, as a subsidiary of the Pavilion Group, would have been well aware of the construction and opening of the Pavilion Shopping Mall that is located right in front of the Fahrenheit 88 building, and which knowledge was the drive behind the purchase of the apartment units in
- B Fahrenheit 88 in the first place. Fifthly, the High Court's reliance on the decision in *DEF v. The Comptroller Of Income Tax* (1950-1985) MSTC 482 as an authority to justify that the holding period of three years is sufficient to indicate investment is misconceived as the issue of period of ownership was not even considered in that case.
- C [15] Sixthly, the High Court had misdirected itself by considering that the 59 units were the only properties owned by the respondent and thus, there was no frequency of transaction, when in fact, the 59 properties had been disposed of in four separate transactions. Seventhly, the High Court erred in deciding that the respondent taxpayer was prohibited from renovating the
- D apartment units since there are existing tenants and for this reason, there was also no necessity to advertise for tenants when the respondent taxpayer had given evidence that only 46 units (out of 59) have existing tenants.
- E [16] Eighthly, the High Court failed to appreciate that the respondent was not in any immediate need of funds, emergencies or financial difficulties that necessitated the sale of what was claimed to be a long-term investment, and that no special exertion was necessary given the strategic location of the properties.
- [17] These grounds shall be examined next.
- F **Analysis & Findings Of This Court**
- [18] It is well-established in tax law that the burden of proof in tax cases lies on the taxpayer to prove that the assessment is erroneous or excessive. Paragraph 13 of Schedule 5 of the ITA clearly states that:
- G The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be on the appellant.
- H [19] The one central issue in this appeal, as it was before the SCIT and the High Court, is whether the disposal by the respondent of its 59 apartment units is subjected to real property gains tax under s. 3 of the RPGT Act or s. 4(a) of the ITA. The appellant before us submitted that the High Court had for a number of reasons as set out above, erred in overturning the SCIT's decision, and in holding that the disposals attracted the RPGT Act, and not the ITA.
- I *Whether Findings Of Fact By The SCIT And Inferences Made Therefrom Are Unassailable*
- [20] We emphasise that para. 34 of Schedule 5 to the ITA provides that either party may appeal to the High Court against a deciding order made by the SCIT on a question of law. Case law authorities have established that the

findings of primary facts by the SCIT are unassailable such that even if the High Court would not have come to the same conclusion on the same material, the decision of the SCIT is not to be disturbed. The court may only set aside the decision of the SCIT if the SCIT had acted without any evidence or on a view of facts which could not reasonably be supported. In *Edwards (Inspector Of Taxes) v. Bairstow* [1956] AC 14, Viscount Simonds for the House of Lords, held that:

For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think fairly summarised by saying that the court should take that course if it appears that the commissioners have acted **without any evidence or upon a view of the facts which could not reasonably be entertained**.

(emphasis added)

[21] This court recently had the occasion to restate the applicable principles governing appellate intervention in appeals against decisions of the SCIT in the case of *International Naturopathic Bio-Tech (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2024] 2 CLJ 519; [2024] 2 MLJ 706. We find it useful for the relevant, self-explanatory parts of the judgment be reproduced hereunder:

[13] First, the tax statute states that the decision of the SCIT is final; and it is appealable only on a question of law. Paragraph 23 of Schedule 5 to the ITA provides:

23. As soon as may be after completing the hearing of an appeal, the Special Commissioners shall give their decision on the appeal in the form of an order which shall be known as a deciding order and which, subject to this Schedule shall be final.

[14] Paragraph 34 of the same Schedule 5 further states as follows:

34. Either party to proceedings before the Special Commissioners may appeal to the High Court on a question of law against a deciding order made in those proceedings.

[15] And to further augment the position that an appeal to the High Court is only on a question of law, para. 39 of Schedule reads thus:

39. The High Court shall hear and determine any question of law arising on an appeal under paragraph 34 and may in accordance with its determination thereof:

- (a) order the assessment to which the appeal relates to be confirmed, discharged or amended;
- (b) remit the appeal to the Special Commissioners with the opinion of the court thereon; or
- (c) make such other order as it thinks just and appropriate.

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- A [17] We should add in this regard that a true appreciation of the law, as so legislated, cannot be emphasised enough. This was highlighted by the Court of Appeal in *Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923, where the following observation was made:
- B [24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as the SCIT. The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not any grievance. It underlines, within the SCIT's jurisdiction, its authority, and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.
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- D [18] Secondly, and it follows from the first, findings of primary facts by the SCIT are unassailable. The High Court cannot interfere with such findings. This much was made clear by the Privy Council in an appeal from Malaysia in the case of *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] CLJU 157; [1981] 1 LNS 157; [1982] 1 MLJ 235, where it was stated as follows:
- E Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; ... From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law ...
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- H [19] The third principle that may be distilled from the authorities is that where the appeal is by way of a case stated, like presently, the High Court is only concerned with the points of law on the facts stated as given in the case stated as set out by the SCIT. It cannot go beyond the case stated from the SCIT. The former Federal Court in *UHG v. Director General Of Inland Revenue* [1974] CLJU 181; [1974] 1 LNS 181; [1974] 2 MLJ 33, in the judgment written by Raja Azlan Shah FJ (as HRH then was) had stated thus:
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It is well established that where the appeal is by way of a Case Stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The court of appeal is not concerned with the evidence given in the Case Stated but with the facts therein stated and it is points of law upon those facts the court has to decide. The question for the court of appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach.

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[20] Fourthly, the High Court is not entitled to interfere with the decision of the SCIT even if the High Court would not have come to the same conclusion, on the same material. In the same case of *UHG v. Director General of Inland Revenue (supra)*, the Federal Court explained thus:

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But where there is evidence to consider, the decision of the Special Commissioners is final, even though the court might not, on the materials, have come to the same conclusion. In treating the question, I can desire no more apt exposition of the law than what is contained in Lord Atkinson's speech in *Great Western Railway Co v. Bater* (1928) 8 TC 231 244 ...

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[21] A similar outcome was arrived at in *Director-General Of Inland Revenue v. Lahad Datu Timber Sdn Bhd* [1977] CLJU 26; [1977] 1 LNS 26; [1978] 1 MLJ 203, where Lee Hun Hoe CJ (Borneo) observed as follows:

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With respect, the learned judge was wrong to interfere with the decision of the Special Commissioners as there was sufficient evidence to support their conclusion. The learned judge, in exercising appellate jurisdiction, was not supposed to alter conclusion of facts simply because he feels that on the evidence the Special Commissioners should not have arrived at the conclusion of facts they did.

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[22] The fifth principle, another corollary of the others, is that even if the primary facts found by the SCIT are capable of two alternative inferences, the High Court would not substitute its own preferred inference. This is trite since an appellate court would only set aside the decision of the tribunal if the tribunal had acted without any evidence or on a view of facts which could not reasonably be supported. But if the primary facts, as found, were capable of supporting two alternative inferences, the appellate court would not substitute its preferred inference over the one validly drawn by the tribunal (see *Furniss v. Dawson* [1984] STC 153 at 166 per Lord Brightman, *Lim Foo Yong Sdn Bhd v. Comptroller-General of Inland Revenue* [1986] STC 255 at 259 per Lord Oliver and reaffirmed in *Richfield International Land And Investment Co Ltd v. IRC* [1989] STC 820).

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[22] We must, as such, reiterate that the court may only set aside the decision of the SCIT if the SCIT had acted either without any evidence or on a view of the facts which could not reasonably be supported.

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- A [23] The High Court, in its grounds of judgment, was fully cognisant of these principles, and even correctly cited cases such as *Edwards v. Bairstow* (*supra*) and the Federal Court decision in *Kota Kinabalu Industries Sdn Bhd v. Director General Of Inland Revenue* [1981] CLJU 50; [1981] 1 LNS 50; [1981] 2 MLJ 186 to emphasise the rule that a court would not disturb
- B findings of fact by the SCIT unless the court considers that the only reasonable conclusion on the evidence contradicts the determination of the SCIT.
- C [24] Nevertheless, despite the above, the High Court concluded that based on its evaluation of the facts presented before the SCIT, the respondent did not engage in trade when disposing of the 59 apartments because the badges of trade did not exist such that gains made by the respondent from the sale of the apartment units are not subjected to income tax. The High Court stated thus:
- D [44] I view that the SCIT had failed to properly examine the badges of trade test and thus, had erred in subjecting the gains to income tax under section 4(a) of the ITA.
- E [25] In our view, it needs no reminding that it is within the remit of the SCIT to determine whether a trade is being carried on, and that outcome is a finding on a question of fact, which should not be so readily interfered with, absent situations as set out by the House of Lords in *Edwards (Inspector Of Taxes) v. Bairstow* (*supra*). This determination is dependent on the assessment on the test on the badges of trade, which in any event is merely a guide which is employed to assist in the deliberation as to whether a set of facts and circumstances would constitute a trade or an adventure in the nature of trade.
- F We should also add that no one single badge of trade is usually conclusive in answering the question of whether a certain transaction is trading in nature, and that it is likely that the answer will turn on a combination of more than one badge.
- G [26] That the answer to the question of whether gains from property disposal are derived from investment or trading depends on the facts of each case for the SCIT to decide on was also clearly stated by the Privy Council in the case of *International Investment Ltd v. Comptroller-General Of Inland Revenue Malaysia* [1978] CLJU 69; [1978] 1 LNS 69; [1979] 1 MLJ 4 in the following terms:
- H The second argument on behalf of the appellant company was that the profit was derived from investing in land and that it was therefore of a capital nature. The argument turns entirely upon the facts. The most important facts which, in the opinion of Their Lordships, the Special Commissioners were entitled to regard as indicating that the appellant
- I company was carrying on the business of dealing in land and that the Penang Road transaction forms part of that business are as follows. The importance, if any, to be attached to each item is entirely for the Special Commissioners to judge ...

(in similar vein, see also the decision of the Federal Court in *Kota Kinabalu Industries Sdn Bhd v. Director General Of Inland Revenue* [1981] CLJU 50; [1981] 1 LNS 50; [1981] 2 MLJ 186).

[27] Thus, even if these findings could be interfered with, it must be by reason of such a finding being one that was unsupported by evidence or that could not have been reached by a properly constituted body of tax commissioners acting reasonably.

[28] In the instant case, the High Court had considered the test on five badges of trade and concluded that none existed, which led to the finding that the disposal transaction of the 59 apartments was trading in nature and subjected to the ITA. We shall evaluate this next.

Whether Badge Of Trade On Subject Matter Of Transaction & Intention On Purchase Established

[29] In examining this badge of trade on the subject matter of the transaction, we note that the High Court had also considered the badge of trade on the intention of the respondent when the properties were first acquired. The intention point is in fact a very key consideration in the badges of trade test but the High Court did not seem to attach sufficient emphasis on the same by having it dealt with separately.

[30] On the element of the subject matter of the transaction, the High Court held that the apartments were consistently held as the respondent's non-current assets in the company's audited accounts and that the respondent's auditors agreed to this treatment after making due enquiry. The High Court noted the SCIT's view that such classification in the audited accounts was not a conclusive indication that the properties are for investment purposes and found that the SCIT had unfairly made an unwarranted speculation about the accounts being manipulated as being without evidence.

[31] The High Court instead found that the respondent had made the investment which were projected to increase in value given the success of the opening of the nearby Pavilion Shopping Mall in 2007; the up-and-coming developments in the surrounding areas at the Golden Triangle of Kuala Lumpur; and the fact that the area is a lively and vibrant shopping strip which boasts upscale brands, a vast variety of restaurants and numerous entertainment outlets. For these reasons, the High Court decided that the respondent never had the intention to trade when it acquired the apartments, and that the purpose of the respondent acquiring the apartments was always to hold them as its investment asset and to yield rental income.

[32] In the analysis of the badge of trade on the subject matter of the transaction, we find that the SCIT was not wrong to have taken the view – which is well-supported by case law authorities – that accounting treatment

- A of the properties – where the respondent had consistently classified the apartments as non-current assets in its financial statements – is not conclusive evidence that they were held for investment and not trading. In other words, such treatment must instead be weighed against other evidence in order to determine the true nature of the transaction.
- B [33] We recognise that accounting treatment and audited accounts would constitute supporting evidence of some weight (see *Odeon Associated Theatres Ltd v. Jones* [1971] 2 All ER 407), but we are equally mindful of this passage from the case of *DJ Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1996] MSTC 2471 which stated the following:
- C (e) Treatment in the accounts
- Right from the time of purchase of the estate till now the estate has been treated as a fixed asset in the balance sheet of the appellants. We do realise that accounting evidence is not conclusive (see *DGIR v. LCW* [1975] 1 MLJ 250). As was said in *Gold Coast Selection Trust Ltd v. Humphrey* 30 TC 228 the method of keeping accounts is often a guide though not conclusive in income tax issues. However, it should be given due weight (see *I Investment Ltd v. Comptroller General of Inland Revenue* (1975) 2 MLJ 208) ...
- D
- E [34] Of importance, we should add, is to determine whether, despite any classification made or professed, the acts and conduct of a taxpayer in relation to its business amount to trading or investment (see the Federal Court decision in *DGIR v. LCW* [1985] 1 BLJ 143; [1975] 1 MLJ 250).
- F [35] Thus, even though the High Court stated that the purpose of the purchase had always been to hold the properties as investment assets to yield rental income and that there was never any indication of an intention to trade, we observe that despite the principal business of the respondent being stated as the letting of properties and property investments, case authorities have held that to ascertain the business of a limited company, one must look at what business it actually carries and not what business it professes to carry
- G on.
- [36] In the case of *I Investment Ltd v. Comptroller-General Of Inland Revenue* [1975] CLJU 61; [1975] 1 LNS 61; [1975] 2 MLJ 208, Raja Azlan Shah FJ (as HRH then was) observed thus:
- H In my opinion, the form which a company takes is no criterion in determining the question whether it was carrying business. To ascertain the business of a limited company, one must look at what business it actually carries and not what business it professes to carry on.
- I [37] In the same context, this court in *International Naturopathic (supra)* had this to say:
- [119] That the accounting evidence is not conclusive and should always be considered with other evidence in order to determine the true nature of the transaction has also been stated by the Federal Court in *Director*

General of Inland Revenue v. LCW [1975] 1 MLJ 250. In that case, the land was purchased with the intention of constructing flats thereon for renting as an investment. The flats were subsequently sold. The Federal Court reversed the High Court and held there was sufficient evidence to conclude that the taxpayer was carrying on a concern in the nature of trade and therefore gains or profits derived therefrom were liable to taxation under Section 4(a) of the Income Tax Act, 1967. On the issue of valuation relevant to the accounting treatment of the land, Lee Hun Hoe CJ (Borneo) said:

It cannot be said that the Special Commissioners reached their conclusion that respondent was carrying on a concern in the nature of trade merely on the transfer of the land from fixed account to trading account in 1967. They have clearly taken other primary facts found by them into consideration. The way the U.C. House kept the account of respondent in respect of the land is admissible to show intention. *However, such evidence must be weighed against other available evidence to enable the Special Commissioners to decide the nature of the transaction. As Buckley J. said at page 299 in Shadford v. H Fairweather & Co Ltd 43 TC 291:*

For, however genuinely the accounts may have been framed by those responsible for them, and however carefully they may have been studied by those responsible for auditing them, the other evidence may show that in fact they do not truly indicate the nature of the relevant operations.

(emphasis added)

[38] It is also true that the SCIT did in para. 10.9 of its grounds of decision in the case stated state that the possibility of the accounts be ‘manipulated’ to benefit certain parties could not be fully disregarded. However, considering the context, it is clear to us that such a remark was made in general terms where the key emphasis in that paragraph is the point that first, the accounting treatment is not conclusive; secondly, the treatment is relevant as a supporting indicator when the existence of the badges of trade cannot be established; and thirdly, the proper determination is to examine whether or not the badges of trade exist on the facts of each particular case.

[39] We, therefore, have no hesitation in accepting this observation made by the SCIT as it is well in accord with the law as shown in the abovementioned cases.

[40] We wish to also add that the tax literature on the badge of trade concerning the subject matter of transaction or asset looks at the nature of the asset in that an asset which does not provide its owner income or enjoyment is more likely to have been acquired with the object of dealing with it – hence, a trading activity. In contrast, properties which yield rental income are generally construed as being held for investment purposes.

[41] As for the badge of trade on the element of the intention or the motive for the purchase of the property, which is subsequently disposed of, having an intention to make a profit indicates a trading activity. In *Rutledge*

- A *v. Commissioners Of Inland Revenue* CS 1929, 14 TC 490; SC 379 it was held that the profit realised on the sale of a million rolls of toilet paper being a large quantity single purchase and resale item, was taxable as being from an adventure in the nature of trade. The purchase was of a large quantity that would not be purchased for ordinary domestic needs, or for investment purposes. This was therefore held to be an adventure in the nature of trade.
- B

- [42] In the instant appeal before us, the appellant contended that the High Court did not appreciate that the intention at the point of acquisition of the properties is not determinative of whether the respondent taxpayer is engaging in an adventure or concern in the nature of trade, particularly when the subsequent act and conduct of the respondent taxpayer are inconsistent with the intention to invest.
- C

- [43] We must make reference to the decision of Sharma J in *NYF Realty Sdn Bhd v. Comptroller Of Inland Revenue* [1985] 1 BLJ 234; [1974] 1 MLJ 182, which ruled that intention must be determined by inference from proved facts, which inference is a question of fact and not law, in the following terms:
- D

- The question of what the intention of a taxpayer was when he acquired an asset, *ie*, whether he bought it as an investment or with a view to selling it at a profit, is a question of fact. It has to be determined by inference from proved facts and such an inference is one of fact and not of law ...
- E

- [44] Another more often quoted judicial pronouncement on what is meant by 'trading' is found in the judgment written by Lord Wilberforce in *Simmons (As Liquidator Of Lionel Simmons Properties Ltd) v. Inland Revenue Commissioners* [1980] 2 All ER 798, as follows:
- F

- One must ask, first what the Commissioners were required or entitled to find. Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock, and, I suppose, *vice versa*. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax ... What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status, neither trading stock nor permanent asset. It must be one or the other ...
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- H
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[45] This decision of the House of Lords, which has been followed by our Supreme Court in *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540; [1994] 2 MLJ 713 is significant as it is authority for two related propositions which are of relevance to the instant appeal.

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[46] The first is that the conduct of a taxpayer subsequent to its acquisition of the asset may be inconsistent with its stated intention to invest in the asset. This, which supports the case of the appellant, is clear from the above observation of Lord Wilberforce, which mentioned that if the intention is not to trade, a permanent investment may be sold in order to acquire another investment which was deemed more satisfactory.

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[47] This, in our view, is really another way of saying that mere intention would not be sufficient to establish that a property was held for the purpose of trading or otherwise. This is because, ultimately, the conduct of the taxpayer makes and evidences such determination. The Federal Court decision in *DGIR v. LCW* [1985] 1 BLJ 143; [1975] 1 MLJ 250 expressed this clearly in the following terms:

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The important thing is to see whether the acts and conduct of the respondent in relation to the business amount to trading. In the words of Buckmaster in *J & R. O'Kane & Co. v The Commissioners of Inland Revenue*:

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... yet the intention of a man cannot be considered as determining what it is that his acts amount to: and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause profits that accrued to be profits arising from a trade or business?

F

[48] We observe that in the instant case, these 59 apartment units were the only investments made by the respondent (including the clubhouse), but notwithstanding the sale, the respondent, despite professing to be a company in the business of owning properties for rental income, had not acquired any other properties. In addition, there was no evidence on the utilisation of the proceeds of the sale either, when it might reasonably be expected that the same be used to invest in other properties.

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[49] We, therefore, agree with the appellant that this did not exhibit conduct on the part of the respondent company, which is consistent with that of an investment company.

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[50] Secondly, *Simmons (supra)* also stands for the proposition that even though the intention at the time of purchase may be for investment, it could later change and be for trading, and *vice versa*. This principle was also followed by this court in *International Naturopathic (supra)*, which highlighted the decision of the English Court of Appeal in *Taylor v. Good (Inspector Of Taxes)* [1974] 1 WLR 556.

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- A [51] In that latter case, the purchase of a property by a husband to be used as a family home was objected to by his wife. This led to the sale of the house. This was a one-off but despite the existence of a badge of trade in view of the short period of ownership (which thus indicated trading gains) it was held that the transaction was not a trading transaction because there was a genuine intention by the taxpayer to live in the house rather than to make a quick profit. The Court of Appeal, therefore, allowed the taxpayer's appeal as it found no evidence of an adventure in the nature of trade.
- B

- C [52] Although the decision of the High Court was set aside, the following observation by Megarry J on the point about a change of intention is unaffected and still instructive:

- D *Even if the house was purchased with no thought of trading, I do not see why an intention to trade could not be formed later. What is bought or otherwise acquired (for example, under a will) with no thought of trading cannot thereby acquire an immunity so that, however filled with the desire and intention of trading the owner may later become, it can never be said that any transaction by him with the property constitutes trading. For the taxpayer a non-trading inception may be a valuable asset: but it is no palladium. The proposition that an initial intention not to trade may be displaced by a subsequent intention, in the course of the ownership of the property in question, is, I think, sufficiently established ...*
- E

(emphasis added)

- F [53] This means that even if the respondent in this case before us could establish its intention when acquiring the 59 apartment units at the Fahrenheit 88 near the Pavilion Kuala Lumpur was purely for investment, it cannot be ruled out that the respondent subsequently changed its intention and decided to sell them for trading gains instead. This again underscores the importance of evaluating the conduct of the taxpayer, which in this case, has been shown to have been inconsistent with that of an investment company.

Whether A Holding Period Of Three Years Signified Investment

- G [54] On the badge of trade concerning the length of the period of ownership of the 59 apartment units, the High Court questioned whether a period of three years was correctly construed as a short period to indicate trading activities.

- H [55] Now, for this badge of trade, in general, property intended for trading is realised within a short time after acquisition. This also means that the longer the period of ownership, the greater the likelihood the property be regarded as an investment rather than a trade (see *Wisdom v. Chamberlain* [1969] 1 All ER 332).

- I [56] Disagreeing with the SCIT, in the instant case, the High Court held that the period of ownership of the 59 apartment units of three years instead signified the purchase was for investment. The High Court dealt with it in the following terms:

[29] The respondent submitted that three years is a short period of ownership. However, I find that there is not a single case by the Courts that has stated that a three-year period is a short period of time.

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[30] In fact, the Court of Appeal in *DEF v. The Comptroller of Income Tax* [1950-1985] MSTC 482 held that the land was the taxpayer's investment although he disposed the land within three weeks after purchasing it.

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[31] Similarly, in *PR Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2008] MSTC 3,716, although the taxpayer only held the parcels of land for approximately one year, the SCIT held that the land was the taxpayer's investment.

[57] In our view, regard must be had to all relevant factors, as was indeed duly considered by the SCIT. We observe that whilst generally a long period of ownership before disposal would more likely to be regarded as an investment, at the same time, all cases, we reiterate, must depend on the consideration of the peculiar facts and circumstances of each case.

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[58] Whilst the High Court was not wrong in making references to the above cases to show that a relatively short period of ownership could mean holdings for investment, we also observe that in *Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal* [2006] 2 CLJ 835; [2006] 3 MLJ 597 the land disposal by the taxpayer was held to be in the nature of trade, even though the land had been held for some 17 years.

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[59] Further, in *AS Sdn Bhd v. Director General Of Inland Revenue* [1991] 1 MSTC 434, a decision which was followed by this court in *International Naturopathic (supra)*, it was held that the relevant period is to be computed from the time the taxpayer is in complete possession of the asset and not from the purchase date.

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[60] We, therefore, are of the view that the SCIT was justified in making the finding on the presence of the badge of trade in respect of the period of ownership of the 59 apartment units by the respondent.

Whether There Was No Frequency Of Transactions

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[61] There exists the badge of trade on the frequency of transaction if there are repetitious transactions in the sense of the disposal of similar property taking place in succession over a period of years or there are several of such transactions at about the same date – thus usually indicating that the purpose is for resale at a profit.

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[62] The appellant here submitted that the High Court had misdirected itself by deciding that because the 59 apartment units were the only properties owned by the respondent, there was thus no frequency of transaction to suggest a trading activity.

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A [63] In respect of this point, about no other properties, reference was in our view correctly made by the respondent to the decision of this court in *ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 3 CLJ 936; [2005] 1 MLRA 714, which stated the following:

B ... the evidence shows that the subject property was the only property bought and kept by the appellant for investment. There is no evidence to show that the appellant had been dealing in land before they acquired the subject property. There is no evidence to show that the appellant have other transactions in properties before. There is also no evidence to show that the appellant was a developer before the transaction. The purchase of the said property was the only transaction carried out by the appellant.

C As such it could not be said that dealing in land is the principal activity of the appellant.

[64] Nonetheless, we observe that in the instant case, whilst the 59 apartment units were indeed the only assets of the respondent, it is inaccurate to contend that the badge of trade on the frequency of transaction is absent.

D This is because the 59 apartment units were disposed of, as mentioned much earlier, in four separate transactions.

[65] We must add to stress that even if the transaction was to be regarded as isolated, superior courts have also established that even a single or isolated transaction could amount to trading (see the Federal Court decision in *E v. Comptroller-General Of Inland Revenue* [1970] CLJU 25; [1970] 1 LNS 25; [1970] 2 MLJ 117 and the Privy Council decision in *International Investment Ltd v. Comptroller-General Of Inland Revenue* [1978] CLJU 69; [1978] 1 LNS 69; [1979] 1 MLJ 4).

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F [66] As such, it is not accurate for the High Court to find that the disposals were not trading in nature by reason, among others, that there was no badge of trade on the frequency of transactions in this case.

Whether There Was Renovation To The Properties To Signify That Purchase Was For Investment

G [67] The following passage from the decision of this court in *International Naturopathic* is apposite to explain this badge on trade concerning changes made to the property:

H [44] Much however depends on the subject-matter. If the property is intended for investment, it could be said that renovation could make it more tenantable, and thus fetch a higher rental. If the property is meant for resale (in the nature of trade), it would probably make little sense to renovate the properties in advance as it might not satisfy the intended purchaser's requirements. However, if the purchase was for other purposes (for example home occupation) and subsequent improvement was done to render it more saleable after it was no longer useful for such original purpose (say after having occupied for so many years), the gain on the disposal should not ordinarily be taxable.

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[68] More specifically pertinent to the instant appeal, however, is the issue of rental, which discussion is commonly raised in the context of this badge of trade. A

[69] The appellant submitted that the High Court was in error when deciding that the respondent taxpayer was prohibited from renovating the apartment units since there are existing tenants and for this reason, there was also no necessity to advertise for tenants. B

[70] First, it is of interest to emphasise that the respondent, when giving evidence confirmed that in fact only 46 units (out of the 59 apartment units) had existing tenants. Not all units were rented out. C

[71] Secondly, the usual argument is that non-rented properties are part of an owner's stock in trade, but authorities also held that there is no need for the relevant property to be rented out in order to show a capital asset. For this proposition, *Marson (Inspector Of Taxes) v. Morton* [1986] 1 WLR 1343 is frequently cited in support, where Browne-Wilkinson VC stated as follows: D

... in my judgment, in 1986 it is not any longer self-evident that unless land is producing income it cannot be an investment. The legal principle of course cannot change with the passage of time: but life does. Since the arrival of inflation and high rates of tax on income new approaches to investment have emerged putting the emphasis in investment on the making of capital profit at the expense of income yield. E

[72] Moreover, in *NYF Realty (supra)*, it was also explained by Sharma J that contrary to the usual understanding that rental collections suggest investment asset, it does not necessarily follow that any gain of rental income means that a property is an investment asset. It was held as follows: F

... However, the Act (*ie*, the Income Tax Act) does require that taxable income shall include:

- (1) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale; or G
- (2) profit arising from the carrying on or carrying out of any profit-making undertaking or scheme.

Most of the cases which have been decided on the subject have involved the application of the first of the above requirements. In determining the application of these requirements, the focal point of enquiry is the dominant purpose for which the particular property was originally acquired. *If it is established that the dominant purpose in the acquisition of property was its resale at a profit, the presence of other purposes, such as the rental of that property does not remove any profit on ultimate sale from the taxable area.* H

(emphasis added) I

- A [73] As is evident in the badge of trade concerning the subject matter of the asset that the presence of rentals may ordinarily indicate the property is for investment, it is again, like any single badge of trade, as shown in *NYF Realty (supra)*, not conclusive; and that depending on the circumstances of each case, the gains of the subsequent sale of such property may still be deemed to be in the nature of trade.
- B
- C [74] We would readily say that if any supplementary work on the property merely makes it more marketable, any gains from its sale should not be taxable under s. 4 of the ITA. Conversely, if the work converts a house into a hotel or into self-contained flats, which are then sold, the nature of the property has completely changed and the disposal gains should be taxable as trading income.
- D [75] However, on the other hand, if no steps at all (such as rentals and advertising) are made *vis-à-vis* the property to increase its rental or investment value, this may not always be consistent with the contention that the property is held for investment. In the instant case, there was no attempt by the respondent to rent out the other 13 apartment units, and there was no renovation at all to all the 59 apartment units.
- E [76] We stress that the relevant badge of trade speaks of changes made to the property. Thus, the aspects to be examined are twofold. The first is the extent of the changes to the property, and secondly, if there is no change, greater consideration on the circumstances of the case is imperative. The following findings in *International Naturopathic* which focused on the subject matter of the property, are especially relevant:
- F [186] We do not disagree that, as mentioned earlier, in situations where nothing is done to the asset, with other things being equal, it may be argued that the asset is held for investment (as stated in *HCM v. Director General of Inland Revenue (supra)*). This is essentially the position of the appellant here. However, much depends on the facts and circumstances of each case and on the nature of the asset. *Here, the properties are shop lots.*
- G *It is commercially fair to say that if they are intended for investment, renovation could make it more tenantable, commanding a higher rental. But if they are meant for resale, it would probably make little sense to renovate lest they not be to the intended purchaser's liking. In this specific context, work done on the property is only to be expected for investment assets, but not for trading asset, departing from the general view that where nothing is done, the asset is held for investment.*
- H (emphasis added)
- I [77] The SCIT did not regard the fact that 13 apartment units were never rented out or that no advertisements were ever issued to solicit potential tenants in itself as conclusive of the issue of whether the gains from the disposal were trading in nature. As is clear though, the SCIT, especially in para. 10.13 of the case stated highlighted, correctly in our view, that despite the respondent – a property investment or rental company – claiming that the apartment units were intended for rental income, the respondent did not,

at any time before or after taking over ownership of the 59 apartment units, undertake any refurbishment or renovation works on the same, unlike what other property investment or rental entities may be expected to have done in similar circumstances. Ordinarily, steps are taken by owners of investment assets to improve or increase the market value of the investment, but evidently, nothing was done by the respondent in this case.

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[78] Furthermore, we reiterate that apart from the lack of efforts on the part of the respondent to generate rental income from the vacant units, there was no evidence to suggest that the sale of these units was made in order to purchase another investment.

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[79] These considerations are not consistent with the High Court's finding that the intention of holding the properties was for investment by generating rental income.

[80] Additionally, although the collection of rental income suggests the properties were held for investment, this is not necessarily the position in all cases. There is merit in the appellant's contention that the rental income in this situation – of the apartment units in Fahrenheit 88 in Pavilion Bukit Bintang – was merely incidental given that the respondent (which, as stated by the SCIT, has Pavilion International Development Fund as its ultimate holding company, in turn 75% majority owned by Qatar Investment Authority, a State-owned sovereign wealth fund no less) was fully aware of the huge commercial potential from the opening of the Pavilion, which meant that profits from resale of the properties must have been keenly anticipated. More so as, they had matured after three years, and are located in a most strategic and developed business location in the heart of Kuala Lumpur.

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[81] In the result, we do not find the approach taken and the conclusion arrived at by the SCIT in the instant case to be erroneous, given that the SCIT in paras. 10.15 to 10.17 found the existence of the badges of trade because, despite the respondent having continued with the rental activities of the affected apartment units, this lasted for only three years, as the respondent decided to entertain what it construed as an 'irresistible offer' to sell the properties.

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Whether The Circumstances On The Sale Indicated That The Apartment Units Were Investment Assets

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[82] This leads us to the discussion on the one other, final badge of trade raised in this case, which is the circumstances responsible for the sale of the property. This badge of trade contemplates certain explanations, such as a sudden emergency, which displaces the contention that the purchase was accompanied by a plan to trade in the property. For examples, the sale may be due to an unanticipated need for funds or a result of financial constraints

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- A or even a compulsory acquisition by the Government, all of which indicate that the sale is not made pursuant to a profit-making scheme, not initiated by the property owner, and unlikely to be a transaction in the nature of trade.
- [83] Regard may helpfully be made to the case of *HCM v. Director General Of Inland Revenue* [1993] 2 MSTC 53 where the taxpayer sold three lots of
- B land to finance her domestic requirements and for the education of her children. The SCIT decided that she was realising her investment, which did not thus attract income tax. This ruling was arrived at notwithstanding the fact that the taxpayer had a history of trading in land ten years prior, given the findings that, among others, she did nothing to enhance the value of the
- C properties, the properties had been held for a long period of time – between ten and 22 years; and she did not take steps to attract purchasers and that the disposal was actuated by her needs and her children’s educational expenses (see also the decision of the Supreme Court in *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ
- D 540; [1994] 2 MLJ 713).
- [84] Essentially, therefore, if a sale is due to a sudden emergency or immediate and unanticipated need for funds, this would suggest that the sale is not for trading.
- E [85] The appellant before us asserted, however, that the respondent in this case failed to demonstrate that the respondent was in any immediate need of fund, or was facing any emergencies or financial difficulties that could have necessitated the sale of what was claimed to be a long-term investment.
- [86] In the instant case, as found by the High Court, the sale was due to
- F the respondent accepting an irresistible offer which was ruled not to show a badge of trade. But this, in our view, seems very different from the sale being attributed to an immediate need of funds or to a forced sale. Moreover, as aptly highlighted by the SCIT, the ‘irresistible offer’ was merely an offer made by potential buyers due to the appreciation of the value of the
- G apartment units. Something which must surely have been envisaged even at the point of the acquisition of these assets in the most strategically located Pavilion Bukit Bintang Kuala Lumpur. It is also not wrong to state that the respondent appeared to admit that it had acquired the apartment units with a view to resale at a profit in light of the witness statement of one of its
- H directors (in charge of business operations) before the SCIT which whilst insisting that the intention is to hold the property for investment and rental income also agreed that the respondent would hold the units until it was time to sell them, with the implication this would happen when the value had sufficiently appreciated.
- I [87] Reference may in this regard be made to the decision of the former Federal Court in the case of *Kota Kinabalu Industries Sdn Bhd v. Director General Of Inland Revenue* [1981] CLJU 50; [1981] 1 LNS 50; [1981] 2 MLJ

186, where Salleh Abas FJ (later, Lord President) in deciding the issue of whether the taxpayer was trading or otherwise when the intention was to sell when value appreciated, made the following especially pertinent observation:

Further, if the intention of the appellant had been to receive rent or income from those properties it would not have purchased those non-income producing properties at all, especially the rubber estates which it kept for about nine years. *The position seems to be that the appellant acquired these rubber lands (items 7 & 8) and the vacant shop lot (item 12) as an investment only with a view to re-sell them as soon as it could realise them at desired profits. Acquisition of properties with this intention does not bring the transactions within the case of a person who is purely and simply disposing of his capital but rather falls within the ambit of a person engaged in an adventure in the nature of trade.* The sale may take many years after the properties were first acquired but this delay is immaterial because the delay may be due to the maturing of assets and the desire of getting a good price or inability to strike a good bargain.

(emphasis added)

[88] Accordingly, the almost inescapable inference is that the disposal of the 59 apartment units was in the nature of trade, as correctly found by the SCIT.

[89] We, therefore, find no substance in this ground of appeal which challenged the findings of the SCIT on the existence of the badges of trade. We are of the view that the findings of fact by the SCIT were made upon evidence before them, adequately supported by primary facts and reasonably reached by the SCIT.

[90] We, therefore, conclude that the gains derived from the disposal of the 59 apartment units are trading receipts and taxable under s. 4(a) of the ITA as business income and not capital receipts taxable under the RPGT Act, as correctly found by the SCIT.

Whether The Best Judgment Assessment For The YAs 2009 And 2010 Are Accurate

[91] As stated earlier, the disposals of the apartment units were carried out by the respondent in four separate occasions from the YAs 2010 to 2011. In respect of the disposal of the three apartment units in the YA 2010, the gains were subjected to additional assessment, whilst the disposal of the balance 56 apartment units in the YA 2011 had been declared by the respondent in its tax return and is therefore a deemed assessment by the Revenue. For the YAs 2009 and 2010, there was no submission of its tax return, which led the Revenue to raise an assessment under s. 90(3) of the ITA – best judgment assessment.

[92] The SCIT found that the respondent had failed to submit its tax return for the YAs 2009 and 2010 even though the company had commenced operation since 1 February 2008. The respondent only sought to do so in

- A 2012, which in respect of the return for the YA 2009 represented a delay of more than three years after the period specified in s. 77A(1) of the ITA. Given the absence of provisions in the ITA which allow a taxpayer to still submit its return subsequent to the raising by the appellant of the best judgment assessment, it would be for the taxpayer, or the respondent herein, to demonstrate the presence of an error in the said assessment.

B [93] The respondent submitted that the appellant has no basis to erroneously compute the chargeable income for the YAs 2009 and 2010 based on the grounds that the chargeable for the YA 2009 is RM401,595 as opposed to the sum of RM403,840, as computed by the appellant. As such, the income tax payable by the respondent is RM80,319 instead of RM80,768. Thus, the respondent claimed to be aggrieved by an additional amount of tax payable, totalling RM449.

C [94] Furthermore, the chargeable income for the YA 2010 is RM396,252 as opposed to the sum of RM489,725 as computed by the appellant. Therefore, the income tax payable ought to be RM79,250.40 instead of RM97,945. Consequently, the respondent is aggrieved by an additional amount of tax payable of RM18,694.60.

D [95] The High Court, on this issue, made, in our view correctly, the following observation:

E [48] The then Supreme Court in *Government of Malaysia & Anor v. Jagdis Singh* [1986] 1 MLRA207; [1987] 2 MLJ 185; [1987] CLJ Rep 110 also shed light on the guiding principles of issuing a best judgment assessment as follows: “The guideline to the best judgment assessment is to be found in *Commissioner of Income Tax, Central and United Provinces v. Laxminarain Badridas* [1937] 5/TR 170 which appears in the judgment of the Privy Council; The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, Their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee’s circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary.”

F [96] However, the High Court later concluded as follows:

G [51] Instead of complying with these principles, the Respondent took into account factors that it ought not to have taken and failed to assess the appellant’s chargeable income based on the relevant material it possessed. I view that these best judgment assessments were raised arbitrarily and not what the respondent honestly believes to be fair estimate of the proper figure of assessment.

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[97] It is not entirely clear, from its grounds of judgment, as to why the High Court found that the appellant had taken into account factors that it ought not to have taken or failed to assess the respondent's chargeable income based on the relevant material it possessed such that the best judgment assessments were raised arbitrarily. A

[98] However, here, we agree with the position taken by the SCIT, which found that the respondent, through its witness, had not given any evidence to show the alleged true or actual income to be reported for the said years of assessment. Neither did the respondent exhibit in what manner the best judgment assessment issued by the appellant is inaccurate, other than the respondent merely stating that the amount ought to be a different sum, without explaining as to why the amount differs from the appellant's assessment. B C

[99] The computation information mentioned by the respondent and referred to by the High Court was, however, derived from the relevant Forms Q submitted by the respondent after the best judgment assessments were raised. More pertinently, we stress that these numbers were not substantiated and properly adduced as evidence before the SCIT. D

[100] We reiterate that the burden of proof lies with the taxpayer to show that the assessment is excessive or erroneous. Here, we emphasise that on the best judgment assessments made by the appellant, no evidence was tendered to demonstrate how the figures submitted by the respondent represented the true or correct amount of income and tax to be imposed. And without explaining as to why the amount differed from the appellant's assessment. E

[101] It is a key feature of the tax legislation that a late submission of tax return may result in penalties being imposed on the taxpayer. At the same time, such late submission may also witness the appellant issuing a best judgement assessment under s. 90(3) of the ITA. When this happens, as it did in this case, the taxpayer may appeal against the best judgment assessment, as done by the respondent here, if the same is claimed to be excessive, in accordance with s. 99 of the ITA. F G

[102] An appeal must be made by submitting a Form Q to the SCIT not later than 30 days after the notice of assessment has been served as provided under s. 99(1) of the ITA. This was done by the respondent in its submission of the requisite Forms Q to the appellant. But there is no information on whether the respondent furnished supporting documents, such as its tax computation and audited financial statements, to make its case that the best judgment assessment, is excessive in comparison to its actual tax liability. Neither does the case stated mention that the respondent had made any application for an extension of time for the appeal by way of submitting a Form N in respect of the application for an extension of period for making an appeal to the SCIT *vis-à-vis* the said best judgment assessments. H I

- A [103] We therefore agree that based on the testimony and evidence being presented before the SCIT, the High Court fell into error when it set aside the SCIT's finding of no proof of excessiveness or error on the part of the best judgment assessment on the tax liability of the respondent as issued by the appellant for the YAs 2009 and 2010.
- B *Whether The Imposition Of Penalty Was Valid*
- C [104] The respondent also submitted that the appellant had imposed a penalty on the respondent in respect of the impugned notices of assessment and additional assessment for the YAs 2009 and 2010 even though the respondent had, at all material times, acted in good faith, made full disclosure and the matter in dispute arose as a result of a technical adjustment. The appellant had thus failed to exercise its discretion but instead had acted mechanically.
- D [105] The High Court agreed with this, and set aside the penalty imposed by the appellant under s. 112(3) of the ITA, and further held thus:
- E [53] I find that the SCIT had erred in dismissing the Appellant's appeal against the penalty imposed by the Respondent because there is no basis for the Respondent to impose penalty under section 112(3) of the ITA in respect of the impugned notices of assessment and additional assessment for the YAs 2009 and 2010.
- F [54] It is not disputed that in the instant case, the Appellant had obtained professional advice from Ernst & Young Tax Consultants Sdn Bhd, a reputable firm in determining its tax liability in relation to the issues at hand.
- G [55] This, to my mind clearly indicates that the Appellant did not deliberately or recklessly submit an incorrect return. The fact that the Appellant consulted an independent professional illustrates that it had no intention to evade or avoid tax.
- H [56] I view that the fact that the Appellant had acted in good faith, took professional advice and made full disclosure to the Respondent constitute sufficient grounds to set aside the penalties imposed.
- I [106] We are mindful that the Supreme Court in *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135 held that s. 113(2) is not a mandatory provision but confers discretion on the appellant as to whether penalty should be imposed or not. The respondent relied on this case to challenge the imposition of the penalty, and this was accepted by the High Court.
- [107] But it is clear from the above stated observations of the High Court that there is a patent inaccuracy in the understanding of the basis of the imposition of the penalty. The respondent referred to s. 113(2) of the ITA which concerns the submission of incorrect return, information return or

report, or incorrect information. The High Court though, whilst correct in referring to s. 112 was however incorrect in attributing the provision to the submission of incorrect returns, which is under s. 113 of the ITA.

[108] The key point however is that the appellant here did not penalise the respondent for any incorrect returns under s. 113 but instead for its non-submission within time under s. 112 of the ITA. In its case stated, it is very clear that the findings of the SCIT in respect of the penalty as found in paras. 10.25, 10.26, 10.27 and 10.29 discussed the failure of the respondent to make any tax returns within the stipulated time under ss. 77(1) and 77A(1) of the ITA, and not on any erroneous or incorrect tax returns.

[109] In addition, more specifically, paras. 10.28 and 10.29 made specific mention of the basis of the imposition of the penalty – which was s. 112 of the ITA. Not s. 113. No penalty under s. 113(2) of the ITA had been imposed on the respondent. It is also noteworthy that despite the appellant having the statutory authority under s. 112(3)(a) to impose a penalty to the maximum of treble the amount of tax payable, in the instant case, the penalty imposed is only 20% over the relevant sum.

[110] We therefore find that the SCIT was correct to affirm the imposition of penalty by the appellant under s. 112(3) of the ITA for the failure by the respondent to submit its tax return for the YAs 2009 and 2010 within the stipulated time. In deciding the issue of penalty under s. 112(3) of the ITA, we are of the view that the High Court had committed a misdirection since the penalty imposed was for the failure to submit a return within time, and not for an incorrect return, for which s. 113(2) of the ITA applies. Further, the penalty was also validly imposed on the additional assessment which had been raised under s. 112(4) since even the respondent's late submission of the tax return for the YA 2010 did not include any declaration of the gains received from the disposal of the three apartment units (which had been sold earlier than the other 56).

[111] We therefore find no justification for the High Court to set aside the penalty in its relevant notices of assessment and additional assessment correctly imposed by the appellant on the respondent. The appellant plainly had the discretion to do so in pursuant of s. 112(3) of the ITA, given the failure of the respondent to submit tax returns for the YAs 2009 and 2010 in accordance with the time period stipulated in s. 77A(1) of the ITA (which is within seven months from the date following the close of the accounting period), which as mentioned earlier, resulted in the inordinate delay of more than three years in respect of the return for the YA 2009 and more than two years for the YA 2010.

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A **Conclusion**

[112] We conclude by reiterating that it is settled law as per para. 13 of Schedule 5 of the ITA, referred to above, that the burden of proof in tax cases lies on the taxpayer to prove that the assessment is erroneous or excessive. The Supreme Court in *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540; [1994] 2 MLJ 713 also stated as follows:

B We recognize that in an appeal by a taxpayer to the Special Commissioners against an assessment made under the Act, the assessment stands unless the taxpayer is able to satisfy the Special Commissioners that the assessment is overcharged. It follows, that in such an appeal the onus is on the taxpayer to demonstrate that the assessment should not have been made, (see *Norman v. Golder* 26 TC 239, per Macnaghten J at p. 295) and so, the assessment stands unless and until the taxpayer satisfies the Commissioners that it is wrong (per Lord Greene MR at p. 295). The taxpayer, therefore, undertakes the same onus when he brings a further appeal to the High Court and yet another appeal to this Court.

C [113] We find that the SCIT had correctly decided that the respondent had failed to discharge its burden of proof that the assessments raised by the appellant were erroneous or excessive. The findings of the SCIT were based on facts, supported by evidence and are therefore unassailable and should not have been disturbed by the High Court. The assessments raised by the appellant and confirmed by the SCIT are, in our judgment, correct, as the respondent had made trading and not capital gains when disposing of the 59 apartment units.

D [114] Neither was there any legitimate basis for the respondent to challenge the validity and propriety of the best judgment assessments issued and the penalty imposed by the appellant against the respondent.

E [115] We therefore reinstate the decision of the SCIT and set aside the decision of the High Court, and accordingly allow this appeal with costs to the appellant, here and below.

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